No. 96-755

Supreme Court, U.S.
FILED
JAN 9 1997
CLERK

In The

Supreme Court of the United States

October Term, 1996

HOUSE OF LLOYD, INC.,
Petitioner,

vs.

FEDERAL INSURANCE COMPANY,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth District

REPLY TO BRIEF IN OPPOSITION

GLENN McCANN
Counsel of Record
THERESA SHEAN HALL
KNIPMEYER, McCANN, SMITH, MANZ & GOTFREDSON
Attorneys for Petitioner
1100 Main, Suite 2200
Kansas City, MO 64105
(816) 221-9500

Legal America Kansas City, MO (816) 471-0110

QUESTION PRESENTED

Contrary to respondent Federal Insurance Company's representation to this Court that the underlying action is a "summary judgment case," the issue presented for review is in a court-tried case where evidence is presented through stipulations of fact and documentary submissions, is the prevailing party to be penalized by the Court of Appeals reviewing the district court's findings of fact under the "de novo" instead of the "clearly erroneous" standard.

REPLY TO RESPONDENT'S STATEMENT OF THE CASE

The importance of the question presented by House of Lloyd's Petition for Writ of Certiorari is demonstrated by the great lengths to which Federal Insurance Company has gone to mask the true nature of the proceedings before the district court.

Federal Insurance Company represents that at the pretrial conference the Honorable Howard F. Sachs "ordered the parties to submit a set of stipulated facts with supporting documentation." (Respondent's Brief in Opposition, p. 3). To the contrary, counsel for House of Lloyd and counsel for Federal Insurance Company agreed at the pretrial conference that the time and expense associated with a full-blown trial could be avoided by presenting evidence to the district court through stipulations of fact accompanied by any exhibits that the parties deemed relevant to the case.

Furthermore, Federal Insurance Company represents that "[The United States Court of Appeals for the Eighth Circuit] accepted as true all of the facts emanating from the district court. (App. B, 7a)." (Respondent's Brief in Opposition, p. 3). A review of the court of appeals' opinion reveals that the appellate court in fact merely stated that it "assum[ed] as true the facts to which the parties have stipulated, and the magistrate judge's uncontested finding that the risk of loss had passed from Versa to Lloyd upon delivery of the conveyor subsystems ... ." (App. B, 7a).

Finally, in response to Federal Insurance Company's repeated assertions that there were no factual issues decided by the district court, House of Lloyd directs this Court's attention to Pages 4-7 of its Petition for Writ of Certiorari.

REPLY TO RESPONDENT'S REASONS FOR DENYING THE WRIT

Federal Insurance Company incorrectly insists that the intent of the parties was not an issue in this action and that there were no findings of fact as to intent. (Respondent's Brief in Opposition, pp. 5, 6, 10). Judge Sachs found that the specified duration of coverage under Federal Insurance Company's policy definitely included the installation period, "which strongly indicates that the period during which Versa would be 'liable' was contemplated as extending through installation and until acceptance." (App. D, 27a). (Emphasis added). In addition, Judge Sachs, relying on extrinsic evidence consisting of Federal Insurance Company's own "Underwriting Guidelines," stated that, "It may also be noted that when Federal wanted to discuss 'legal liability' it knew such express wording was appropriate. (Doc. 231, Exh. C.)" (App. D, 27a-28a). (Emphasis added).

Perhaps most telling is the fact that the court of appeals in reversing the holdings of the district court relied on a letter written by Federal Insurance Company to its insured long after the loss as demonstrating "not only that Federal refused to provide a defense for Versa, but also that Versa understood the Installation Floater to be an indemnity provision." (App. B, 12a-13a). (Emphasis added).

The crux of Federal Insurance Company's position is that inasmuch as the viability of House of Lloyd's claims required ascertaining the meaning of the terms of its insurance policy and since the parties filed stipulations of fact, appellate review is "de novo." These generalizations are an over simplification of the matter before this Court and are wide of the mark.

Where the conclusions of the trial court depend on its choice of which competing inferences to draw from undisputed basic facts, appellate courts should defer to such findings of fact absent clear error. Reliance Steel Products Company v. National Fire Insurance Company of Hartford, 880 F.2d 575, 576 (1st Cir. 1989). Furthermore, the "clearly erroneous" rule loses none of its vigor when the lower court's findings do not rest on credibility determinations, but are based instead on physical or documentary evidence or inferences from other facts. Anderson v. City of Bessemer City, 470 U.S. 564, 574, 105 S.Ct. 1504, 1511, 84 L.Ed.2d 518 (1985).

In closing, petitioner directs this Court's attention to the fact that the importance of the question presented was recognized by Justice Blackmun in his separate opinion concurring in the judgment in Anderson v. City of Bessemer City. Justice Blackmun's opinion states, in pertinent part, as follows:

> I would like to join the Court's Opinion, for I think its judgment is correct, and I agree with most of what the Court says. I, however, do not join in the broad dictum, ante, at 1511-1512, to the effect that the same result is to be reached when the district court's findings are based wholly on documentary evidence and do not rest at all on credibility determinations. In the past, I have joined in at least one opinion that, generally, is to the opposite effect. (Citations omitted).
>
> While the Court may be correct in its dictum today, certainly this case does not require us to decide the question. The record contains far

> more than documentary evidence, as the Court's opinion so adequately discloses. In a case that requires resolution of the question, I might eventually be persuaded the Court's approach is wise. I prefer, however, to wait for a case where the issue must be resolved and where it has been briefed and argued by the parties, rather than to address the issue by edict without these customary safeguards.

Id. 470 U.S. at 581-582, 105 S.Ct. at 1515-1516.

There is no question that the United States Court of Appeals for the Eighth Circuit improperly conducted a "de novo" weighing of the evidence in this case. Its decision is clearly in conflict with other circuits, as well as this Court's decision in Anderson v. City of Bessemer City. Therefore, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

GLENN McCANN
Counsel of Record
THERESA SHEAN HALL
KNIPMEYER, McCANN, SMITH,
MANZ & GOTFREDSON
Attorneys for Petitioner
1100 Main, Suite 2200
Kansas City, MO 64105
(816) 221-9500